

บทความ

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The Right to be Nomadic? Freedom of Movement in the Aspect of Mokens

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บทคัดย่อ

ยังไม่ค่อยมีการสำรวจในเชิงลึกเกี่ยวกับความเกี่ยวข้องกันระหว่างสิทธิมนุษยชนของเสรีภาพในการเคลื่อนย้ายถิ่นฐานและคนไร้รัฐ โดยปรากฏชัดในกรณีของชาวมอแกนซึ่งเป็นคนไร้รัฐที่มีวิถีชีวิตอย่างชนร่อนเร่อยู่ในประเทศไทยมาหลายชั่วอายุคน แต่น่าเป็นห่วงว่าพวกเขาถูกจำกัดสิทธิในการเคลื่อนย้ายถิ่นฐาน โดยในบทความนี้ ผู้เขียนจะกล่าวถึงภูมิหลังของชาวมอแกน วิถีชีวิตและการที่รัฐเข้ามาจำกัดเสรีภาพในการเคลื่อนย้ายถิ่นฐานของพวกเขา นอกจากนี้ผู้เขียนยังจะกล่าวถึงองค์ประกอบของเสรีภาพในการเคลื่อนย้ายถิ่นฐานและความเกี่ยวข้องกันระหว่างเสรีภาพดังกล่าวกับคนไร้รัฐ โดยผู้เขียนเห็นว่า แทนที่จะมุ่งเน้นไปที่กระบวนการทำให้สัญชาติแต่เพียงอย่างเดียว การมุ่งเน้นไปที่เสรีภาพในการเคลื่อนย้ายถิ่นฐานน่าจะเป็นหนทางที่ดีกว่าสำหรับการส่งเสริมสถานะและสิทธิของชาวมอแกน และในตอนท้าย ผู้เขียนสรุปว่า การส่งเสริมเสรีภาพในการเคลื่อนย้ายถิ่นฐาน จะทำให้ชาวมอแกนที่เป็นคนไร้รัฐสามารถปรับตัวเข้ากับสังคมไทยได้ดี และสามารถเข้าถึงสิทธิมนุษยชนด้านอื่น ๆ ได้มากขึ้น

คำหลัก: ชนร่อนเร่ มอแกน เสรีภาพในการเคลื่อนย้ายถิ่นฐาน คนไร้รัฐ

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ABSTRACT

The relevance between the human right of freedom of movements and stateless persons have hardly been explored in depth. This is especially true when it comes to Stateless Moken people, who have been living a nomadic lifestyle in Thailand for generations yet restriction on their movements are still a concern. In this article, the writer will examine the background of the Mokens, their way of life and how their freedom of movement are being restricted by the States; the writer will also examine the components of freedom of movement and its relevance with stateless persons. The writer argues that instead of going through the naturalization process, observing the freedom of movement are a better way to enhance the status and rights of Mokens. At last, the writer concludes that with the observance of the individual's freedom in movement, the stateless Mokens would be in a more advantageous position to assimilate into the Thai society and enhance their access to other human rights

Keywords: Normadic, Moken, Freedom of Movement, Stateless Person

Introduction

In 2004, the Mokens had attracted considerable attention of the Thai government as they demonstrated their skills in foreseeing the Tsunami. As hundreds and thousands of lives were taken, not a life was lost on the Surin Island, where the Mokens resided.¹ For them, the tsunami is referred as *laboon*, ‘wave that eats people’,² and their ways of

¹ Narumon Arunotai, ‘Moken traditional knowledge: an unrecognised form of natural resources management and conservation’ (Oxford, UK) 58 International Social Science Journal 139

² Rebecca Leung, Sea Gypsies Saw Signs in the Waves, CBSN March 18 2005 <http://www.cbsnews.com/news/sea-gypsies-saw-signs-in-the-waves/2/>

lives had contributed to their instinctive nature,³ which provided them with the most effective natural disaster warning system without the aid of the modern technology.

Yet, in the modern society, the dark skin and nomadic lifestyle of the Mokens were being discriminated and perceived as outdated, backward, and without potential for progress.⁴ They had the skill of agricultural cultivation yet they had chosen to live a non-sedentary lifestyle. Little had they known that such ways of lifestyle indirectly contributed to their exploitation by the middlemen and the enterprises. In another word, their human rights, and in particularly their right to freedom of movement, has been significantly challenged.

In this article, the writer will first provide a general background in regards to the right of freedom of movement and how it interface with statelessness in general. The writer will then examine the Moken's way of life and how the naturalization process would be of advantage or restriction for the nomadic Mokens. Finally, the writer wants to examine the significance of freedom of movement towards the Mokens and in what ways could this particular right be stretched in accordance to their individualized needs. With the understanding of the scope of freedom of movement and its nexus with the Mokens, it would contribute in a better assimilation of Mokens into the Thai society.

Freedom of Movement and Stateless Persons

The idea of liberty of movement, or freedom of movement, is listed as the fundamental right under the international human rights law.⁵ However, often time when we come across this right, our understanding is generalized to referring to being able to

³ 143, Arunotai

⁴ 141, *ibid*

⁵ Art. 13, Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948) GAOR 3rd Session Part I 71.

freely move from one place to another. This rights seems so common to the point that we've taken it for granted. However, if we put the principle of liberty of movement into the context of stateless person, such liberty would place a significant role in facilitating the stateless persons not just into prospective naturalization but also it will protect them in securing other human rights such as the right to health, to work, and to further developments.

While right to nationality is supposedly regarded as 'the right to have right,' in this aspect, the writer supplemented that freedom of movement is equally important as it affects the stateless person's central ways of life. As referred in the general comment, '[L]iberty of movement is an indispensable condition for the free development of a person.' In the following, we will observe some of the key components of freedom of movements and its affect to Stateless Persons.

Freedom of Movement and its Components

Definition of Freedom of Movement

The definition of the Freedom of Movement wasn't fully explained however, they appeared in almost all of the core human right instruments. Under the United Nations Declarations of Human Rights (UDHR), it stated that 'everyone has the right to freedom of movement and residence within the borders of each State.'⁶ Similar contents can equally be found in the International Covenant on Civil and Political Rights ('ICCPR')(1966), which had encompassed the criteria, limitations and circumstances for expulsion relating to freedom of movement.⁷ Additional provisions in supporting of the freedom of movement can be found in the International Convention on the Elimination

⁶ Art. 13, Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948) GAOR 3rd Session Part I 71.

⁷ Art. 12 of the 1966 International Covenant on Civil and Political Rights.

of All Forms of Racial Discrimination (1966) ('ICERD')⁸, the Conventions on the Rights of the Child ('CRC')⁹ and naturally, the Convention relating to the Status of the Stateless Persons.¹⁰ These provisions constitute the core of the human rights regime in addressing to freedom of movements. In the following, we would examine the scope of its application and evaluate whether they can adequately address the stateless concerns in relating to their freedom of movements.

Scope of Application of Freedom of Movement

As stated in Article 12 of ICCPR, 'everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'¹¹ Notice that the article encompass 'everyone lawfully within the territory', which would include the nationals, aliens, or any non-citizens who set foot on the host country. Without exception, that would include stateless persons as well, since the stateless persons, though shouldn't be considered as an alien, but would be incorporated in the subject scope of 'everyone.' To this end, we can say that the human rights have extended such right to stateless persons.

⁸ Art. 5(d)(i), International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁹ Art. 10, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

¹⁰ Art. 26, Convention relating to the Status of Stateless Persons (done 28 September 1954, entered into force 6 June 1960) 360 UNTS 130.

¹¹ Art. 12(1), International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

The negative effects of ‘Lawfully within the territory’ and Stateless Persons

However, it is important to notice that while Article 12 has set up the criteria as to the subject of protection, it has also implicitly prepared a ground for plausible expulsion. The condition of ‘legally staying’ is used to protect the states sovereignty by allowing States to exercise discretionary power in determining who is legal and who is illegal to stay. Therefore, the term ‘illegally staying’ might post a negative effect on the stateless persons. Subsequently, they might end up in expulsion by the States.

For stateless persons, there may be various causes which make them fall into the zone of ‘illegal stay’: stateless persons who entered the host country legally but due to long duration of stay, they had become ‘illegal’ person; there might be a change in the government structure,¹² state succession, which turned them abruptly from citizen to stateless; still others might entered the host country legally but committed some crimes and become illegal.

In some instances, the states would conduct monitoring on the movement of these types of stateless persons by requesting them to report to the police after certain period of time. However, such practice had been criticized.¹³

Resolutions under the international law

In regards to the issue of ‘illegal stay’ criteria, the international law has basically presented two resolutions for stateless persons. First of all, the General Comments has mentioned that those who had first entered illegally but later being regularized, such person should be governed under Article 12. Another solution is that even if their status

¹² UN High Commissioner for Refugees (UNHCR), *Convention relating to the Status of Stateless Persons. Its History and Interpretation*, 1997, available at: <http://www.refworld.org/docid/4785f03d2.html> [accessed 3 October 2016].

¹³ General Comment 27: Freedom of movement(Article 12) , UN Doc CCPR/C/21Rev1/Add9(1999), para 17

is unknown, under the international law, they should be treated as *de jure* stateless and receive protection based on territorial sovereignty of the states.

Freedom to Leave any Country and Stateless Persons

The freedom of movement also encompasses the freedom to leave any country¹⁴, not to be arbitrarily deprived of enter his own country,¹⁵ but set out that such right is subjected to the limitations as ‘provided by law, are necessary to protect national security, public order, public health or morals or the right of freedoms of others.’¹⁶

In regards to this specific right, it has posed a significant challenge for stateless persons; whether a country grants the stateless person the right to leave the country directly represented its attitude toward them as accommodating or hostility. For some countries like Latvia, stateless persons carried a travel document as issued by the States and they are free to travel abroad. However, for some of the non-contracting states of the Stateless Conventions, restrictions were imposed on them even when they had reasonable ground to travel abroad, they would need to receive permission from the government to move and to travel abroad. In this extent, the right to freedom of movement is challenged both within the host country and at the border.

Another issue arises in the definition of ‘enter his own country’. For citizens and aliens, it would be easy to connect and discern the nationality and entering his home country wouldn’t be much of a problem, as the international law has obligated the home country to receive its own citizen. However, in the context of stateless person, would they be eligible to consider the host country which they dwelled in for generations as ‘his own?’

¹⁴ Art. 12(2), International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹⁵ Art. 12(4), *ibid*

¹⁶ Art. 12(3), *ibid*

Under the General Comment, it pinpoint out that the idea of ‘his own country’, with the expanding spirit of the human rights, could reach beyond the territorial and physical location, beyond the country of nationality, and referring to the country which he has the closest connection with. In this context, it is important to drill into the self-conception of the relative person as which country he or she would feel most fit in. Typical example could be found in the Ateker, an Itung’ a-speaking group who practiced nomadic pastoralism, in which the Ateker people did possess a Kenya nationality however, as they are inhabited at the borderland area between four countries such as Sudan, Ethiopia, Kenya and Uganda, they might feel that they owe their allegiance ‘to the Ateker nation in all its manifestations across four countries.’¹⁷

Nevertheless, it is noted that in practice, whether a person can leave or enter one’s own country very much depends on whether that country regarded the person as their people. This referred back to the traditional concept that nationality issue was once under the pure governance of the host state but in the aspect of statelessness, such human right matter would need to be dealt in a humane term as whether leaving the host country would leave that specific person into further vulnerable situation of statelessness.

Expulsion and Stateless Persons

Particular attention should be given to the condition of expulsions, in which it provides the State with certain entitlement in protection of the sovereignty and security of the States. Under Article 12(3), it states that,

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre*

¹⁷ Aukot E, ‘Am I Stateless because I am a Nomad?’ (2009) Forced Migration Review 18

public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Again, the writer would like to put such expulsion in the context of stateless persons and it comes to the writer's concern that: whether such expulsion towards stateless persons would be in conformity with the human right? Could a state ever expel a person who is stateless, meaning those who 'are not considered as a national by any state under the operation of law'?¹⁸

The writer holds that if it is an expulsion towards a verified stateless persons, it would not be appropriate to expel the person when there's no receiving states. Such person may be governed by the host country's criminal law for misconduct, but expulsion shouldn't occur unless there's a confirmed receiving state. In the context of statelessness, it is substantial to not just looking at the present statelessness situation but also at the prospective likelihood of prolonged statelessness in the future. For if the government had expelled an alien who had entered legally, such alien would remain to be a national upon return to his home country; inversely, if the government had expelled a stateless persons, it would only exacerbate their vulnerability and they would still remain to be a stateless person. In this sense, the consequences of expulsion would be greater towards stateless persons than to any regular aliens who enjoyed diplomatic protection.

Under the stateless convention, even though it stated that the Contracting states shall not expel a stateless person lawfully, however, when it comes to the grounds of national security, it allows such expulsion to take place if there's a due process of law.¹⁹

¹⁸ Art. 1, Convention relating to the Status of Stateless Persons (done 28 September 1954, entered into force 6 June 1960) 360 UNTS 130.

¹⁹ Art. 31, Convention relating to the Status of Stateless Persons (done 28 September 1954, entered into force 6 June 1960) 360 UNTS 130.

From the writer's point of view, the term 'lawfully' didn't provide adequate protection to stateless persons as it is very rare that they would be lawful.

The right to freedom of movement has been an important aspect for stateless persons. As we have a thorough understanding of the components involved, it is now suitable to turn to one of the minority groups in Thailand-The Mokens.

Background of Mokens

The Mokens, or often referred as *Chao Lay*, were a nomadic marine group who speaks Austronesian language.²⁰ They were further divided into three groups-the Moken, the Moklen, and the Rak Lawai. Currently, there were around 800 Mokens in Thailand, living along the southern islands of the Andaman Sea along the coastlines of Thailand and Myanmar. They were far more than a simple fisherman but a hunter gatherer, in which they were capable of free form diving and stayed under the water for a long time; they had a superior vision under the water, as they could contract their pupils to adjust under water vision for acuity.²¹ Furthermore, the Mokens are capable of catch fishes without nets but basically using bare hands and harpoons. In the word of Arunotai, they were basically 'living in a self-sufficient economy.'²²

Their skills

Besides their superb foraging skills, they are also known for making *khawang*, a type of boat made of lightweight *Salacca* that even when it was filled with water, it will not sink. In the study of Arunotai, who had spent consecutive nine months living among the Mokens, the Mokens created their own tools for foraging fishes, sea shells and other marine lives. She further commented that their traditional lifestyle should be observed as an asset in the area of natural resource management; further, they also contributed

²⁰ 140, Arunotai

²¹ 145, ibid

²² 144, ibid

as a ‘living proof’ that the human physical can be trained and extended,²³ such as the skill of staying under the water for a long period of time. At last, the Mokens are well-knowledge about the marine biology, species, and natural resources.²⁴

With the general understanding of the Mokens, we can observe that the Mokens had been living a simple lifestyle. Therefore, it is now time to observe how their position in the context of international law had been changed and the impact of specific human right.

Lives on the move

As previously mentioned, the Mokens has been living a traditional nomadic ways of living for centuries, moving back and forth between the territories between Thailand and Myanmar. However, with the increment of tourism, some of the Mokens become more sedentary due to the developments of hotels, towns and villages along the coastline.²⁵ Around 200 of the Mokens had been settling on Ko Surin National Park, even before the park was built in 1981. A few of them had Thai nationality, while others remain stateless.²⁶

The Challenges as faced by the Mokens and the Right to Thai Nationality

Despite that the Mokens have been living on the Ko Surin National Park for centuries, yet the Mokens had encountered various challenges which had impacted their lives.

²³ 140, *ibid*

²⁴ 145, *ibid*

²⁵ Narumon Arunotai, ‘Moken Livelihood in the Surin Islands National Park’ (Chulalongkorn University Social Research Institute)

²⁶ Andaman Pilot Project, ‘Way of Life-Moken’ (Chulalongkorn University Social Research Institute)

First of all, the Thailand's National Park Act required that the areas within the National Park must be free of ownership and individual control;²⁷ Secondly, despite their residence along the Andaman Sea for so long, the Government still deem them as trans-border nomadic people and didn't actively facilitating them in accessing to Thai citizenship.

Due to the Moken's lack of legal status, they couldn't be hired formally to work in the park, nor did they have the capacity to work or access in the office setting. However, the park staff had randomly hired them in the position of garbage collector, gardeners and boatmen on the Island.

Other areas of their lives were also affected. Typical example would be the time when the Mokens got married with a Thai. For other aliens and foreigners, they would be eligible to acquire for a permanent residence and access to naturalization process. However, for Mokens, they would not have an easy access to naturalization.²⁸ Such reluctance from the States would perhaps need to be traced back to the national security issue and the concern of the influx immigration. In accordance with the report, it is mentioned that 'the government's reluctance to offer citizenship to this group lies in a fear that to do so would entice the remaining 2, 800 Mokens currently residing in Myanmar to move to Thailand.'²⁹

Thai policies

The Thai government's perception

As the citizenship concerns have surfaced after the tsunami in 2004, the National Security Council established a committee for the purpose of identifying the 'accurate'

²⁷ Temporary paper UNHCR

²⁸ 34, *ibid*

²⁹ 35, *ibid*

Mokens who would be eligible for Thai citizenship.³⁰ On the side of Mokens, they felt unease that in order to access citizenship, they would need to abandon their traditions in its entirety and adapt to the modernity of Thailand. In one way or another, the Mokens concerns are relatively true. Under the Thai law, the requirements for naturalization are as following:

1. *Becoming sui juris in accordance with Thai law and the law under which he has nationality*
2. *Having good behavior*
3. *Having regular occupation*
4. *Having a domicile in the Thai Kingdom for a consecutive period of not less than five years till the day of filing the application for naturalization*
5. *Having knowledge of Thai language as prescribed in the Ministerial Regulations.*³¹

Among these criteria, having ‘regular occupation’, ‘having a domicile in the Thai Kingdom for a consecutive period of not less than five years’ and ‘knowledge of Thai language’ might post potential hindrance to the Moken’s way of life.

First of all, in regards to the ‘regular occupation’, that would mean an occupation with a stable income and accompanied with a work permit. In Thailand, there is an even further requirement that only aliens with special expertise and with salary exceeding certain amount can be issued with a work permit. Under the Alien Business Act, there were several types of works which they were restricted from the aliens, and therefore, the illegal migrants or other aliens, are restrictive to work in hazardous or manual works. In fact, they were not even being governed by the aliens law nor the labor law.

³⁰ 35, *ibid*

³¹ Section 10, Thai Nationality Act (1965), with Amendments from the Nationality Act(No. 2) and the Nationality Act(No.3) of 1992.

Having a stabilized domicile poses further challenges to the lifestyle of the Mokens. Their life is basically drifting on the sea and the land they occupied were not registered land. If they would like to fit into the naturalization requirement of the States, they would need to have some type of proof of their identity and sufficient amount of money to guarantee their residence. Another alternative would be to register under another household, which they would face plausible fraud or being subjective to landowners. Both ways would not work in the context of the Mokens.

In view of the above circumstances, the Mokens are faced with a predicament of ‘forced into a nation, citizenship and nationality they do not subscribe to’³², or face the uncertainty of potential exploitation.

Freedom of Movement and Nomadic Mokens

‘Lawfully within the territory’ and Nomadic Mokens

For the Mokens, as majority of them had been issued a card which stated that they are ‘not registered’, it would seem that they are very prone to expulsion. However, in the perspective of the writer, the fact that they are the holder of a card that was officially issued by the Thai government, and in consideration that they had been permitted to stay for generations, this has indirectly symbolize that their status had been regularized. In this respect, the Mokens who had held this card ‘must be considered to be lawfully within the territory for the purpose of article 12.’

Freedom to choose his residence and Nomadic Mokens

Freedom to choose his residence happened to be a challenge to the Nomadic Moken’s lifestyle as at present, the Thai government confined them in the National Park in which they were restricted from catching fishes. This greatly hinders their core way of

³² Ekuru Aukot, ‘Am I Stateless because I am a Nomad?’ (2009) Forced Migration Review 18.

life. As Ivanhoff, an established French anthropologist who had been living among the Mokens for years, described that, ‘They're born on the sea, live on the sea, die on the sea. They know its moods and motions better than any marine biologist. They're nomads, constantly moving from island to island, living more than six months a year on their boats.’³³

Conclusion

There are still numerous aspects of human rights that are closely linked with the daily lives of the Mokens. In order to evaluate whether human rights regime can be invoked to expand the human rights of the Mokens, it is substantial to put freedom of movement as a core and its relevance with other human rights. Mokens have been residing in Thailand for decades; naturalization wouldn't be a suitable path for them as they had by passed such step and restrictions on their movements should be waived.

³³ {Leung, 2005 #164}

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